U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF S-, INC.

DATE: JULY 27, 2017

APPEAL OF NEBRASKA SERVICE CENTER DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, an information technology company, seeks to employ the Beneficiary as a senior project lead. It requests classification of the Beneficiary as a member of the professions holding an advanced degree under the second preference immigrant classification. *See* Immigration and Nationality Act (the Act) section 203(b)(2), 8 U.S.C. § 1153(b)(2). This employment-based immigrant classification allows a U.S. employer to sponsor a professional with an advanced degree for lawful permanent resident status.

The Nebraska Service Center Director denied the petition, concluding that the record did not establish, as required, that the labor certification supported classification of the position in the advanced degree professional category because it stated education and experience requirements that could be read as requiring less than an advanced degree.

On appeal, the Petitioner states that the terms of the labor certification meet the minimum requirements for classification of the position in the advanced degree professional category under section 203(b)(2) of the Act.

Upon *de novo* review, we will dismiss the appeal.

I. LAW

Employment-based immigration generally follows a three-step process. First, an employer must obtain an approved labor certification from the U.S. Department of Labor (DOL).[1] *See* section 212(a)(5)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i). By approving the labor certification, DOL certifies that there are insufficient U.S. workers who are able, willing, qualified, and available for the offered position and that employing a foreign national in the position will not adversely affect the wages and working conditions of domestic workers similarly employed. Section 212(a)(5)(A)(i)(I)-(II) of the Act. Second, the employer may file an immigrant visa petition with U.S. Citizenship and

[1] The date the labor certification is filed, in cases such as this one, is called the "priority date." A beneficiary must be eligible as of that date, and so in this case the Beneficiary must have had a master's degree or bachelor's degree and the five years' requisite experience, and otherwise meet the terms of the labor certification, by the date the labor certification was filed.

Immigration Services (USCIS). *See* section 204 of the Act, 8 U.S.C. § 1154. Third, if USCIS approves the petition, the foreign national may apply for an immigrant visa abroad or, if eligible, adjustment of status in the United States. *See* section 245 of the Act, 8 U.S.C. § 1255.

For this advanced degree professional position, the labor certification must provide that the job requires an advanced degree or its equivalent. *See* 8 C.F.R. § 204.5(k)(4)(i). In pertinent part, Department of Homeland Security regulations define the term "advanced degree" as: "[A]ny United States academic or professional degree or a foreign equivalent degree above that of baccalaureate. A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree." 8 C.F.R. § 204.5(k)(2).

II. ANALYSIS

In this case, because the labor certification allows for less than an advanced degree, the Petitioner has not established that the position qualifies for advanced degree professional classification. In determining whether the position offered qualifies for advanced degree professional classification, we look to the terms of the labor certification. The required education, training, experience, and skills for the proffered position are set forth at Part H of the labor certification. In this case, Part H states that the offered position has the following minimum requirements:

H.4.	Education: Master's degree in "CompSci, Eng (any), InfoSys, BusAdmin, or rela[ted field]"
. . .	
H.6.	Experience in the job offered: 12 months.
. . .	
H.8.	Is there an alternate combination of education and experience that is acceptable? Yes.
H.8-A.	If Yes, specify the alternate level of education required: Other.
H.8-B.	If Other is indicated in question 8-A, indicate the alternate level of education required: Bachelor's plus 5 years of progressive experience.
. . .	
H.9.	Is a foreign educational equivalent acceptable? Yes.
H.10.	Is experience in an alternate occupation acceptable? Yes.
H.10-A.	If Yes, number of months experience in alternate occupation required: 12.
H.10-B.	Identify the job title of the acceptable alternate occupation: "IT Analyst, Sr. Software Engineer, Software Developer, Application Dev"
H.14.	Specific skills or other requirements: "[I]n lieu of the above education and experience requirements, we will accept a Bachelor's Degree (or foreign equivalent) in Computer Science, Engineering (any), Information Systems, Business Administration, or related field, plus five years of progressive experience in the IT field. . . . We will accept

> any suitable combination of education, training, or experience in lieu of the above stated education and experience requirements. . . .

As noted above, a petition for an advanced degree professional must establish that, among other things, the job offer portion of the labor certification requires at least a master's degree or foreign equivalent degree or a bachelor's degree or foreign equivalent degree followed by five years of progressive experience.

In order to determine what a job opportunity requires, we must examine "the language of the labor certification job requirements." *See, e.g.*, *Madany v. Smith*, 696 F.2d 1008, 1015 (D.C. Cir. 1983). USCIS must examine the certified job offer exactly as it is completed by the prospective employer. *See Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984). Our interpretation of the job's requirements must involve reading and applying the plain language of the alien employment certification application form. *Id.* at 834. Moreover, we read the labor certification as a whole to determine its requirements. "[The] Form ETA 9089 is a legal document and as such the document must be considered in its entirety." *Matter of Symbioun Techs., Inc.*, 2010-PER-01422, 2011 WL 5126284 (BALCA Oct. 24, 2011) (finding that a "comprehensive reading of all of Section H" of the labor certification clarified an employer's minimum job requirements).[2]

The Director denied the petition, concluding that because the language in H.14 states that the Petitioner will accept "any suitable combination of education, training, or experience in lieu of the above stated education and experience requirements," it would accept less than the minimum requirements for advanced degree classification.

On appeal, the Petitioner asserts that the position qualifies for advanced degree professional classification on the basis that the proffered job requires a master's degree or a bachelor's degree plus five years of progressive experience. The Petitioner states that because the Beneficiary was working for the Petitioner at the time of filing and potentially qualified based only on the alternative requirements, it was required to include the language "in lieu of the above stated education and experience requirements" based on binding precedent and DOL regulations. However, the Petitioner's claim is not persuasive.

The Board of Alien Labor Certification Appeals (BALCA) ruled in *Matter of Francis Kellogg*, 1994-INA-465 and 544, 1995-INA 68 (Feb. 2, 1998) (*en banc*), that: "[W]here the alien does not meet the primary job requirements, but only potentially qualifies for the job because the employer has chosen to list alternative requirements, the employer's alternative requirements are unlawfully tailored to the alien's qualifications . . . unless the employer has indicated that applicants with any suitable combination of education, training or experience are acceptable."

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[2] Although we are not bound by decisions issued by the Board of Alien Labor Certification Appeals, we, nevertheless, may take note of the reasoning in such decisions when considering issues that arise in the employment-based immigrant visa process.

The statement that an employer will accept applicants with "any suitable combination of education, training or experience" is commonly referred to as *Kellogg* language and was incorporated into the DOL's regulation at 20 C.F.R. § 656.17(h)(4)(ii). However, the Petitioner's acceptance of any suitable combination of education, training, or experience "in lieu of the above stated education and experience requirements" goes beyond *Kellogg* language to create a different minimum requirement by allowing for a combination of education or experience that could be less than a single master's degree or a single bachelor's degree plus five years of progressive experience. As the Petitioner does not define what would constitute a suitable combination that would qualify "in lieu of" the stated requirements, we cannot find that labor certification supports the requested classification. Neither the Act nor USCIS regulations allow a position to be classified as an advanced degree professional position if the minimum requirements can be met with anything other than a single academic degree. Therefore, as the minimum requirements for the job opportunity can be satisfied with less than a single U.S. master's degree or foreign equivalent degree, or less than a single U.S. bachelor's degree or foreign equivalent degree followed by five years of progressive experience, the labor certification does not support the requested classification of advanced degree professional under section 203(b)(2) of the Act.

The Petitioner further states on appeal that it intended the language "in lieu of the above stated education and experience requirements" to reflect and comply with the *Kellogg* language in order to cast a wide net and attract the most U.S. workers, but without accepting something less than an advanced degree as a minimum qualification. The Petitioner included newspaper advertisements and internal and external recruiting materials for the proffered positions as evidence of its claimed intent; however, these reflect the identical language from section H.14 of the labor certification and do not describe what the Petitioner considered to be a suitable combination of education and experience "in lieu of" the stated master's degree or bachelor's plus five years of experience. Therefore, even if we were to consider evidence of the Petitioner's intent, the record does not contain sufficient evidence to demonstrate the Petitioner's intent with regard to the minimum requirements.

Finally, we note that the Petitioner asserts that USCIS improperly denied the petition as a technical matter without first issuing a request for evidence (RFE). The regulation at 8 C.F.R. § 103.2(b)(8)(iii) gives the Director the discretion to request additional evidence or deny a petition without first issuing an RFE if all required evidence is submitted but does not establish eligibility. The Director did not deny the petition based on an insufficiency of evidence, and therefore was not required to issue an RFE. Regardless, the Petitioner has had the opportunity to submit additional evidence on appeal, which we have reviewed. The Petitioner's evidence is not sufficient to establish that the position qualifies for advanced degree professional classification.

III. CONCLUSION

The Petitioner has not established that the position qualifies for advanced degree professional classification. For this reason, the petition may not be approved.

ORDER: The appeal is dismissed.

Cite as *Matter of S-. Inc.*, ID# 595531 (AAO July 27, 2017)